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No. 1007

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN J. MORSE,
Petitioners,

vs.

D. A. HINDMAN, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND MOTION FOR LEAVE TO FILE.

Petition

MARVIN JAMES MORSE
980 Barkley Ct.
Pinole, California
Pro-se Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN J. MORSE,
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION

Now comes the petitioner and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1651 of Title 28, United States Code, directed to the United States Court of Appeals for the Tenth Circuit to review an order of that Court entered on September 17, 1969, dismissing petitioner's appeal from the United States District Court for the District of Kansas and for such other and further relief as may be just in the premises.

MARVIN J. MORSE
Pro se petitioner
980 Barkley Ct.,
Pinole, Calif.

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN J. MORSE,
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vs.

D. A. HINDMAN, et al,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petition

The pro se petitioner, Marvin J. Morse,[1] prays a writ of certiorari issue to review the judgment and opinion

1. The additional respondents hereinafter mentioned in this petition for certiorari and against whom petitioner is asserting adverse claims to real property are: Pauline Hindman; Charley A. Lynd; Elida Lynd; Tomlinson-Kathol, Inc.; William T. Kemper; Ray H. Quackenbush; Eugene Crabtree; Frank E. Hedrick; Theodore Carter; Jim Donham; E. Davis Hickman; Jessie I. Wilcoxen; Mobil Pipeline Company; Producers Gas Equities, Inc.; Warren E. Tomlinson; Gerold J. Kathol; Oread Oil Company, Inc.; Joe Hickman; Jones, Shelburne and Former, Inc.; Barton Oil Company; Charles W. Aikens, James W. Owens; Russel Cobb, Jr.; Lydea E. Kearns.
The additional parties plaintiff in the Federal Court asserting rights as heirs of testator but not parties to this petition are: Margaret Christensen; Bernadine Scott; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hansen; Catherine M. Ransom; Shirley Y. Hendersen; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; and Myron Gfeller as Conservator of the Estate of Mary Catherine Shepard, deceased.

Of the United States Court of Appeals for the Tenth Circuit entered herein on September 17, 1969.

CITATIONS TO OPINIONS

The opinion and judgment of the Court of Appeals have not been published but appear in the appendix hereto at pages A.8 and 11. The opinions and orders of the District Court upon which the appeal is based appear in the Appendix at Pages A.1. to 7.

JURISDICTION

The Circuit Court order dismissing the appeal was entered on September 17, 1969, at 0050 hours (1250 AM) on December 17, 1969 a telegramed motion for additional time was received at the office of the Clerk of the United States Supreme Court which was granted that day extending the time to file to and including December 26, 1969 without prejudice as to whether the motion was timely. If timely the court presumably has jurisdiction under 28 USC 1254(1). However, the Courts jurisdiction is also invoked under 28 USC 1651, see House v. Mayo 324 US 42; Hicks v. Dist of Columbia 382 US 252.

QUESTIONS PRESENTED

1. Whether under 28 U.S.C. 1292(a)(1), an order by a United States District Court staying a common law suit in ejectment pending a final determination of a State Court equitable quiet title action (initiated by defendants after having pleaded in Federal Court) operates as an interlocutory injunction against plaintiffs and is therefore appealable.

2. Whether under rule 58(2) Federal Rules of Civil Procedure, the ruling made by the Court from the bench, followed by the Clerk making a minute entry in the docket sheets, constitutes entry of judgment and

starts the running of statutory period of the time for the filing of notice of appeal, or does the filing by the Court at a later date, of a separate document, containing thereon the judgment of the Court start the running of time to appeal?

3. Whether the Courts of the State of Kansas can acquire jurisdiction over real property by the filing therein of a suit to quiet title by one who is a defendant, and against parties who are plaintiffs, in a Federal Court suit in ejectment disputing title to the same property.

STATUTES INVOLVED

FEDERAL STATUTES

Rule 4(a) F.R.A.P.
Rule 58(2) Fed. R. Civ. P.
Rule 60(b) (4)
Title 28 U.S.C. 1292(a) (1)
Title 28 U.S.C. 1254(1)
Title 28 U.S.C. 1983
Amendment XIV, Section 1 of the Constitution of the United States.

STATE STATUTES

K.S.A. 60-1001-Ejectment

STATEMENT OF THE CASE

The official style and title of this case is *Marvin J. Morse, plaintiff-appellant, and Mary Catherine Shepard, et al., plaintiffs v. D. A. Hindman, et al., defendant-appellants, Case No. 20-69 in the United States Court of Appeals for the Tenth Circuit.*

The jurisdiction of the Federal District Court was invoked because of diversity of citizenship, plaintiffs Catherine Shepard and Margaret Christensen being citizens of Oregon and Utah respectively and defendants

being citizens of Kansas, Missouri, California, and one Texas corporation; and, because the jurisdictional amount exists.

Briefly stated, on March 3, 1966, two plaintiffs, Shepard and Christensen filed a class action in the United States District Court for the District of Kansas (R.7) on behalf of themselves and all others similarly situated. The answer of defendants (R. 17) contained five special defences, one of which challenged the plaintiffs' right to maintain a class action. On October 21, 1969, the District Court entered an order upholding the special defence by finding that:

> "The Court cannot under the circumstances say that the class is so numerous that the joinder of all the members is impracticable, particularly when plaintiffs may individually prosecute this action for the protection or recovery of their alleged interests or rights in the real estate involved.'

and therein granted plaintiffs leave to amend the petition for themselves individually. (R. 49).

On October 28, 1966, defendants Hindman and Lynd instituted suit in the (State) Rooks County District Court against all of the remaindermen consisting of the class referred to in the original complaint in Federal Court.

On November 1, 1966, the plaintiffs filed their amended complaint, since that date every person claiming an interest in the property and whose claim was of record at the start of the litigation, has been properly joined as party plaintiff or defendant by lawful order of the Court in the Federal proceedings. However, of the some twenty parties defendant in the Federal Court proceedings only two, Hindman and Lynd, are parties to the State Court proceedings.

Plaintiffs in the Federal Court are asserting title in

fee-simple and immediate rights of possession to described real property situated in Rooks County, Kansas, as beneficiaries of a testamentary trust, and seek to eject defendants. Charley A. Lynd is and has been in continuous possession of the surface estate under a conveyance executed by the life-tenant-trustee, George W. Atherton and his wife on February 11, 1944, to which he purports to have quieted title thereto on April 12, 1944, in Rooks County District Court Case *No. 7807, Lynd v. Hillman, et al.* Two other defendants claim pipeline easements under conveyances executed by Charley A. Lynd and wife, and all other defendants claim interest in producing oil leases executed by Charley A. Lynd and wife, D. A. Hindman and wife, and George W. Atherton and wife.

The Federal Court denied applications of plaintiffs to enjoin the State Court proceedings (R. 48 & 146). Trial therein was had and on September 3, 1968 the State District Court entered a judgment purporting to quiet title to the disputed property in Charley A. Lynd, the appeal therefrom was perfected, the record and appellants' opening briefs are on file in the Kansas Supreme Court, awaiting further action.

In the Federal Court the defendant Mobile Pipeline Co. filed a motion for summary judgment (R. 161) supported by certified copies of the 1944 State quiet title judgment (7807 supra) (R. 166). This petitioner filed an answering brief pointing out that the proceedings defendant relied on made the quieting of title to the property dependent on a favorable judicial construction of the Will under which the plaintiffs assert title and that the judgment therein is void on its face for failure to get jurisdiction of all of the indispensable parties in a suit to construe a will, to wit: George W. Atherton, the life-tenant (see *Hansen v. Denkla, 357 US 235*), and

for numerous other defects, and thereafter filed a motion for summary judgment against all defendants. Both motions were heard together and on July 3, 1968, the Federal District Court entered separate orders denying both motions.

The Federal Court case was placed on the September 9, 1968 Pre-Trial Calendar and on that day the Court heard oral arguments on plaintiffs' motion to vacate the order denying an injunction against the State Court proceedings and for relief thereunder and defendants' motion to stay the Federal Court proceedings pending a final determination of the judgment in State Court. The Court announced its ruling from the bench denying plaintiffs' motion to enjoin the State Court proceedings and the Clerk entered the ruling in the Docket Sheets (R. 367, entry 185). Thereupon the defendants offered in evidence exemplified copies of the purported Findings of Fact and purported Judgment of the State District Court in support of their motion to stay.

On September 25, 1968, the Federal Court filed a written order (R. 367, entry 191), denying plaintiffs' motion heard and ruled on from the bench on September 9, 1968 (A.1) and on October 11, 1968 entered its Order Granting Stay of the Federal Court proceedings (A-3).

Notice of Appeal was filed by plaintiff on October 25, 1968, seeking a general review of "all adverse rulings" of the Federal District Court and specific appellate review of:

1. All orders refusing to enjoin the State Court proceedings.
2. The Order Granting Stay of the Federal Court proceedings.
3. The order denying plaintiffs' motion for summary judgment.

The defendant-appellants promptly filed motions to dismiss the appeal; on February 10, 1969, petition for certiorari in *Morse v. Hindman, Case No. 1031 October Term, 1968* (supra) was filed, *certiorari denied on April 1, 1969, leave to file petition for rehearing denied May 17, 1969,* and on September 17, 1969, the Court of Appeals for the Tenth Circuit filed its order dismissing petitioner's appeal on which this petition is founded.

The order of the Court of Appeals denying the Appeal is based on the Court's finding that:

1. The notice of appeal is timely only as to the order of October 11, 1968 granting a stay of the Federal Court proceedings; however, though timely, the Court holds that the order is not appealable for the stated reason that "the relief sought is principally equitable in nature; a quiet title judgment, on accounting, and an imposition of a trust upon certain funds. The first prerequisite for entertaining the appeal from the stay order is entirely lacking, i.e., that the action stayed be essentially an action at law."

2. The notice of appeal is not timely as to the order filed by the Court on September 25, 1968, for the reason that the minute entry made by the Clerk in the docket sheets, when the Court announced from the bench that the motion was denied, constituted entry of judgment and the time to appeal began to run from that date.

3. The notice of appeal is untimely as to all other orders and "we may not consider them".

REASONS FOR GRANTING THE WRIT

1. THE ORDER OF THE COURT BELOW CONFLICTS WITH THE THEORY AND PRINCIPLE OF DECISIONS OF THIS COURT AS TO THE PROPER APPLICATION OF RULE 1292 (a) (1) FEDERAL RULES OF APPELLATE PROCEDURE.

The Tenth Circuit Court of Appeals adopted appellee's contention that petitioner's claim is "principally equitable in nature" and on this interpretation denied the appeal for the stated reason that only actions that are "principally a law" are appealable when stayed by the Federal District Court pending the outcome of State Court proceedings.

The statutes of Kansas on ejectment read:

> *K.S.A.60-1001.* ACTIONS FOR POSSESSION; EJECTMENT. (a) *PETITION.* In any action to recover possession of real property, including an oil or gas lease or mineral interest, it shall be sufficient if the petition state that the petitioner has a legal or equitable interest therein and the right of possession.
>
> (c) *JUDGMENT; WHEN PLAINTIFF PREVAILS.* If plaintiff prevails the judgment shall be for possession and damages for loss of rents and profits, if any, and execution to enforce the same shall be issued to the sheriff by the clerk at the written request of the party entitled thereto.

In plaintiffs' complaint we allege legal title to the real property as beneficiaries of a testamentary trust and seek damages for waste to the inheritance caused by unauthorized production of oil from the property. Defendants are in possession of the land and deny the legal estate and right to possession of plaintiffs. Defendants'

title originated under a conveyance from the life-tenant named in the same will under which plaintiffs claim title. Defendants further allege title has been established by adverse possession and by a 1944 quiet title judgment, which plaintiffs allege is void on its face.

The position adopted by the Court of Appeals that plaintiffs' form of action is an equitable quiet title action is a legal impossibility, especially under the old form of pleading, for, as was said in *Gibbs v. Bates, 234 S.W. 175, 150 Ark. 344:*

> "Equity jurisdiction to quiet title independent of statute can only be invoked by a plaintiff in possession holding the legal title. The reason is where the title is a purely legal one and someone else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such a case the party in possession has a constitutional right to a trial by jury. ... The plaintiff claiming under legal title and defendant being in possession, the plaintiff had a full and complete remedy at law, and chancery had no jurisdiction in the premises."

Thus, with defendants in possession and plaintiff asserting legal title, we could not file suit in what was once the equity side of the court, and the reasons given by the Court of Appeals for denying the appeal is in conflict with the decisions of this court in *Enlow v. New York Life Ins. Co., 293 U.S. 379,* and reaffirmed in *Baltimore Contractors, Inc. v. Royal Ins. Co., 337 U.S. 254 (1949),* wherein this court held that an action staying a proceeding *at law* in Federal Court while a State court proceeds with an equitable proceeding, acts as an injunction against the plaintiffs from which an appeal will lie.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF RULE 58(2) FEDERAL RULES OF CIVIL PROCEDURE.

The finding by the Court of Appeals that under Rule 4(a) F.R.A.P. the entry made on the civil docket by the Clerk at the time the Court announced its ruling from the bench constitutes entry of judgment fails to take into consideration all of the statutory provisions affecting entry of judgment.

As stated by the Honorable Judge Thornberry of the Fifth Circuit Court of Appeals[2] in *Pure Oil Company v. Boyle, 370 F. 2d 121, 122:*

> "Since July 1, 1963, rule 58 Fed. R. Civ. P. has required that every judgment shall be set forth on a separate document."

and, to paraphrase the ruling therein, as it applies to this case, "Nothing was done by the Court on September 9, 1968, which can be said to constitute a judgment. The only act on the part of the Court was oral, and the only written evidence of such action was the minute entry by the Clerk. . . . The only document which can constitute judgment for the purpose of appeal is the formal order signed and filed by the Court on September 25, 1968", and notice of appeal was filed within the next 30 days.

Defendants would argue that the order of September 25, 1968, was an order denying a rehearing of an earlier order denying an injunction and that the time for filing

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[2]See also: *Burke v. Comm. of Int. Revenue, 1st Cir. 301 F. 2d 803; Burns v. Richardson, 308 U.S. 73* (fn. 11, pg. 83); *United States v. Hark, 320 U.S. 531.*

an appeal or motion for rehearing had run, thus the notice of appeal is not timely. The answer to that is that the appeal is well founded on the stay order (supra) and the Appellate Court had jurisdiction on apepal to review all orders of the lower court.

3. THE FINDING OF THE COURT OF APPEALS THAT THE STATE COURTS OF KANSAS CAN LITIGATE TITLE TO REAL PROPERTY OVER WHICH THE FEDERAL COURTS ARE EXERCISING PRIOR JURISDICTION IS IN CONFLICT WITH THE THEORY AND DECISIONS OF THIS COURT AND IS ALSO IN CONFLICT WITH DECISIONS OF THE HIGHEST COURT OF THE STATE OF KANSAS.

In *Cline v. Burke Const. Co., 260 U.S. 226,* this Court set out the principle of comity, directing that Courts of co-ordinate jurisdiction were to avoid conflict by avoiding interference with the process of each other. However, in the courts of the State of Kansas this principle is not followed; in *Graves v. Nat. Mut. Ins. Co., 164 Kan. 267, 188 P. 2d. 945,* the Kansas Supreme Court took notice of the distinction made by this Court between *in rem* actions where the question of jurisdiction over the *rem* dictated the use of injunctions against courts of concurrent jurisdiction, and *in personam* actions where multiple litigation was preferable to conflict between the Courts, and made the observation that the decision in *Burke* (supra) applied to Federal Courts only, and therein directed courts under its jurisdiction to issue injunctions against courts of secondary jurisdiction hearing the same argument between the same parties whether the actions are *in rem* or *in personam.*

In *Williams v. Payne, 150 Kan. 462, 94 P. 2d 341,* the Kansas Supreme Court directed a Kansas district court

to issue an injunction enjoining plaintiffs from prosecuting an action in the Missouri State Courts. Indeed, the decisions of the Kansas Supreme Court are universal that the court first acquiring jurisdiction over either an *in personam* or *in rem* action retains jurisdiction to the exclusion of another court which asks or seeks to assume it.[3]

Under the mandates of this Court in *Burke* (supra) and *Covel v. Heyman, 111 U.S. 176*, and cases cited therein, the Courts of the United States are directed to protect their jurisdiction in *in rem* proceedings; this, both the District Court and the Appellate Court have refused to do.

Under the decision in *Hansen v. Denkla 357 U.S. 235*, this Court, in effect, directed that when the highest court of a state consistently enforced a rule concerning its jurisdiction, that rule is to be applied evenly in all decisions within that jurisdiction; thus when the Courts of the United Staets took jurisdiction of this *in rem* action, those Courts having first acquired jurisdiction, should have properly held and retained exclusive jurisdiction over this action against the Courts of Kansas, even to the extent of enjoining the Kansas State Court proceedings.

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[3]See also: *Shaefer v. Milner, 156 Kan. 769, 137 P. 2d 156; Bridgeport Mach. Co. v. Arthur A. Beard Co., Inc., 135 Kan. 711, 11 P. 2d 990; Hoad v. Home State Bank, 176 Kan. 625, 272 P. 2d 1054; City of Hutchinson v. Hutchinson Gas Co., 125 Kan. 346, 264 P. 68.*

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

MARVIN J. MORSE

Pro se petitioner

980 Barkley Court

Pinole, California 94564

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER

On this 9th day of September, 1968, this matter came on for hearing before the Court,

First, upon the motion of plaintiff, Marvin J. Morse, to vacate the order of this Court entered March 8, 1968, refusing to enjoin the parties from proceeding in an action then pending before the Rooks County, Kansas District Court;

Second, upon the motion of defendants, D. A. Hindman and Charley A. Lynd, to stay proceedings in this Court pending the outcome of the action in the Rooks County, Kansas District Court.

Thereupon, the Court, after hearing arguments and statements of counsel and upon being fully advised in the premises, finds that plaintiff's motion to vacate and set aside the order of this Court entered March 8, 1968, should be denied.

It is so ordered.

Thereupon, the Court considered the motion of defendants, Hindman and Lynd, to stay further proceedings between the parties in this Court, and the Court, after fully considering the evidence submitted and the arguments and

statements of the parties and the counsel, finds that such motion should be taken under advisement, that defendants should be granted ten days to file a brief in support of their motion, and that plaintiff should be granted ten days' time thereafter within which to file reply briefs.

It is so ordered.

/s/ GEORGE TEMPLAR
United States District Judge

Filed September 25, 1968

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER GRANTING STAY

This action was first initiated in this Court when plaintiffs Mary Catherine Shepard and Margaret Christensen filed on March 3, 1966, a class action on behalf of themselves and other remaindermen under the provisions of the will of James E. Atherton, deceased, as a class. The action was brought to establish the rights of plaintiffs in described real estate in Rooks County, Kansas; to set aside deeds conveying interest in the property to defendants Hindman and George W. Atherton and Charley Lynd; declaring a quiet title judgment rendered in case number 7807 by Rooks County, Kansas District Court to be void; setting aside deed from Margaret Christensen to George W. Atherton; and praying money damages, actual and punitive, against defendants Lynd and Hindman; and also praying ejectment of oil and gas lessees and others claiming an interest in the property.

Defendants challenge the right of plaintiffs to maintain the suit as a class action and the Court on October 21, 1966, sustained defendants' special defense that members of the class were not sufficiently numerous to support the maintenance of a class action, but the Court, at that time, granted leave to plaintiffs to file an amended complaint

for themselves individually. On November 1, 1966, an amended complaint was filed by the same plaintiffs, as individuals, seeking substantially the same relief originally prayed for.

In the meantime, defendants Hindman and Lynd had instituted an action in the District Court of Rooks County, Kansas against Mary Catherine Shepard and other persons claiming an interest in the same real property. The determination of the rights and interests of the respective parties in that real estate is the basis of plaintiffs' suit in this Court. On plaintiffs' application, numerous holders of mineral interests in the land were made defendants in this Court and demands for an accounting were sought from each of such defendants, together with a prayer that they be excluded from any interest in the property about which the litigation is involved.

This Court has denied applications of plaintiffs to enjoin defendants from proceeding with the quiet title action in the Rooks County State Court. During the pendency of this action, plaintiff Mary Catherine Shepard died, and the action has been revived in the names of her successors in interest.

The case was placed on the September 9, 1968 Pre-Trial Calendar of the Court, and prior to that time, plaintiffs on September 3, 1968, filed a motion again seeking to enjoin defendants Hindman and Lynd from proceeding in the state court with the action they had instituted there and requesting this Court to vacate the order it had entered denying an injunction to enjoin parties from proceeding with the action in the state court. This motion the Court denied.

On September 4, 1968, defendants filed a motion to stay proceedings in this Court and offered in support of the motion a certified copy of a judgment supported by duly

certified copies of Findings of Fact and Conclusions of Law entered by the District Court of Rooks County, Kansas on September 3, 1968, purporting to quiet the title of the defendants here against the plaintiffs to the described real estate, the subject of the litigation before this Court.

The Court heard this motion on September 9, 1968, and received in evidence certified copies of the Findings and Conclusions and the Judgment entered September 3, 1968 by the Rooks County State Court.

It appears from the evidence submitted that the state court did render a judgment as claimed by Hindman and Lynd quieting their title to the land against plaintiffs here and that the judgment is final. The adjudication of the state court of the issue of ownership in the real estate here involved is determinative of the rights of all the parties to that property. It was said in the case of *Mandeville v. Cantebury,* 318 U.S. 47, 49:

> "But where the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other."

Again, in *Ballantine Books, Inc. v. Capital Distributing Co.,* 302 F.2d 17 (2nd Cir.), that court set forth the applicable rules as follows, p. 19:

> "The well established rule is that a federal court is not required to abate the normal in personam action on a plea of a pending action in a state court. . . . Had this case been initiated as a civil action rather than by arbitration, it would have been a simple contract action, with none of the in rem characteristics which required the application of a different rule in such

> cases. . . . In such cases, it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings."

And, in *Princess Lida v. Thompson*, 305 U.S. 456, the following principle was stated:

> "Where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."
>
> "But if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other."

This principle was sustained in the Tenth Circuit by the case of *Brinkley v. Hassig, et al.*, 83 F.2d 351.

There is another aspect of the case to which reference should be made. A judgment rendered by a state court of competent jurisdiction is entitled to full faith and credit in all federal courts and bars an action in a federal court on the same cause between the same parties. A state court judgment, operating as a merger and extinguishment of the original claim or demand, will bar an action in a federal court on the same cause of action between the same parties or their privies. If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. The judgment of the state court will be conclusive as to all points and questions actually put in issue and decided in the action in the state court. See 50 C.J.S., *Judgments*, § 900, and at § 899 of the same treatise, we find the general statement of applicable law that the principle of res judicata is applied as between

federal and state courts; and where suits on the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, regardless of which suit was first commenced.

Presumably the judgment rendered by the Rooks County District Court, excluding plaintiffs here from any interest in the property involved, is a valid and enforceable judgment. If it is not vacated or reversed, the causes of action in the federal and state courts being substantially the same, the judgment will be conclusive on all points and questions actually put in issue and decided in the action in the state court as between the parties and their privies. See cases cited in 50 C.J.S., *Judgments*, § 900, p. 522.

One of the plaintiffs, Marvin J. Morse, has announced to this Court that a new trial is being sought from the judgment rendered against him and the other plaintiffs by the Rooks County State Court, and if the motion is overruled, that an appeal will be taken by them to the Kansas Supreme Court. Under such circumstances, it is the view of this Court that a stay of further proceedings should be granted as requested by defendants Hindman and Lynd until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case. Thereafter, the Court will consider any further proceeding required by the facts and circumstances as they then appear.

It is by the Court so ordered.

Dated at Topeka, Kansas, this 11th day of October, 1968.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 11, 1968

DO NOT PUBLISH

Appendix

In the United States Court of Appeals
Tenth Circuit

September Term, 1969

MARVIN J. MORSE, *Plaintiff-Appellant,* and MARY CATHERINE SHEPARD, et al., *Plaintiffs,* v. D. A. HINDMAN, et al., *Defendants-Appellees.*	No. 20-69

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. C. T-3987)

George B. Powers and Benjamin C. Langel filed a motion to dismiss appeal for defendants-appellees Tomlinson-Kathol, et al.

Richard Jones filed a motion to dismiss appeal for defendant-appellee Mobil Pipe Line Company.

Thomas C. Triplett filed a motion to dismiss appeal for defendants-appellees Charley Lynd, Elida Lynd, D. A. Hindman and Pauline Hindman.

Before MURRAH, Chief Judge, and PICKETT, Circuit Judge.

PER CURIAM

Plaintiff seeks to appeal from "each and every adverse finding, ruling, order and decision" entered in this proceeding by the district court. Defendants move to dismiss the appeal on the grounds that the notice of appeal is untimely as to all save one of the orders enumerated therein, and that the remaining order is not appealable.

The most recent order of the district court in this case, that which prompted this appeal, was entered October 11, 1968, staying further proceedings to await the finality of a state court judgment entered September 4, 1968. That judgment determined the title to certain property in Rooks County, Kansas, ownership of which was claimed by plaintiffs in this case, and upon which their other claims for relief depended. The notice of appeal herein was filed October 25, 1968.

We agree that the notice of appeal is timely only as to the stay order of October 11, 1968. Rule 4(a), F.R.A.P., requires that a notice of appeal be filed within thirty days from the date of the judgment or order appealed from. It provides further that a "judgment or order is entered within the meaning of the subdivision when it is entered in the civil docket." The order plaintiff recites as having been made September 25, 1968, was entered in the docket September 9. Assuming solely for argument that that and all earlier orders are final and appealable, the notice is untimely and we may not consider them.

The stay order of October 11 is not itself a final and appealable order. In *Ephraim Freightways, Inc., v. Red Ball Motor Freight, Inc., 376 F. 2d 40 (10th Cir. 1967)*, this court stated:

> "It is apparent that the order denying the motion to stay is not a final decision under 28 U.S.C. Section 1291. Therefore, the order is appealable, if at all, only as an interlocutory order refusing an injunction under 28 U.S.C. Section 1292 (a) (1). . . . It has been made clear in a series of United States Supreme Court decisions that an order staying or refusing to stay proceedings in the United States District Court is appealable as an interlocutory injunction only if the action in which the order was made is essentially an action at law and the stay was sought to permit the prior determination of some related equitable matter. [Citations omitted.]" 376 F. 2d at 41.

Here, as in that case, although plaintiffs claim damages, the relief sought is principally equitable in nature; a quiet title judgment, an accounting, and imposition of a trust upon certain funds. The first prerequisite for entertaining the appeal from the stay order is entirely lacking, i.e., that the action stayed be essentially an action at law. See also *Jackson Brewing Co. v. Clarke, 303 F. 2d 844 (5th Cir. 1962). See Annot., 18 A.L.R. 3rd 400.*

The motions of defendant-appellees are granted and the appeal is dismissed.

Filed September 17, 1969

Appendix

In the United States Court of Appeals
Tenth Circuit

September Term, 1969, September 17, 1969

Before MURRAH, Chief Judge, and PICKETT, Circuit Judge.

MARVIN J. MORSE, *Plaintiff-Appellant*, and MARY CATHERINE SHEPARD, et al., *Plaintiffs*, v. D. A. HINDMAN, et al., *Defendants-Appellees.*	No. 20-69

Upon consideration of the motions to dismiss it is ordered that motions be and are hereby granted. The appeal is dismissed.

William L. Whittaker
Clerk

By /s/ RUTH H. JACOBSON
Deputy Clerk

184	Sep 4	Defts. Lynd, & Hindmans' motion to stay proceedings filed.
185	Sep 9	At Topeka, Templar-J: Pltf. Morse's motion to vacate order - denied. Defts' motion to stay proceedings - taken under advisement.
186	Sep 9	Memorandum opinion filed in District Court of Rooks County dated August 5, 1968 filed.
187	Sep 9	Judgment filed in District Court of Rooks County dated September 3, 1968 filed.
188	Sep 12	Letter to Mr. Tom Triplet from Marvin J. Morse filed.
189	Sep 19	Defts memorandum of authorities filed.
190	Sep 23	Pltf. Marvin J. Morse's motion to enjoin Mobil Oil Company from disbursing funds filed.
191	Sep 25	Order denying pltf's motion to vacate and set aside order; motion of defts Hindman and Lynd to stay further proceedings between parties - taken under advisement, defts granted 10 days to file brief in support of their motion, pltf granted 10 days thereafter in which to reply filed and entered. Templar-J. cc to counsel.
	Oct 7	At Topeka, Templar-J: At the call of the calendar, case passed until Friday.
192	Oct 11	At Topeka, Templar-J: Pltf Morse's motion to enjoin Mobil Oil Company from distributing funds - Court stays all proceedings.
193	Oct 11	Order granting stay until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case filed and entered. Templar-J. cc to counsel.
194	Oct 25	PLAINTIFFS' NOTICE OF APPEAL filed. Copies mailed to:

LIBRARY
UPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 24 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1007

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS TOMLINSON-KATHOL, INC.; WILLIAM T. KEMPER; RAY H. QUACKENBUSH; EUGENE CRABTREE; FRANK E. HEDRICK; THEODORE CARTER; JIM DONHAM; E. DAVIS HICKMAN; JESSIE I. WILCOXON; THE FOURTH NATIONAL BANK AND TRUST COMPANY, WICHITA; WARREN TOMLINSON, GERALD J. KATHOL; OREAD OIL COMPANY; CHARLES AIKENS; JOE HICKMAN; JAMES W. OWENS; RUSSELL COBB, JR.; BARTON OIL COMPANY AND LYDIA E. KEARNS IN OPPOSITION

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January 23, 1970

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OPINIONS BELOW

The opinion of the United States District Court for the District of Kansas and the opinion of The Court of Appeals for the Tenth Circuit are unreported but are both set forth in full commencing on pages 3 and 8 respectively of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether an order staying a federal court equitable action pending the determination of a state court action involving the same factual and legal issues is appealable.

2. Whether a notice of appeal filed October 25, 1968, was timely when the basic order from which the appeal was attempted was entered March 8, 1968, and an order refusing to vacate the March 8 order was entered upon the clerk's docket on September 9, 1968.

STATEMENT

This is the second time petitioner has applied to this court for a writ of certiorari during the course of this litigation. This court denied his first petitions in Nos. 1031 and 1081 of the October, 1968 term on April 1, 1969.

The litigation originated as a purported class action by the filing of a "Petition" in the United States District Court for the District of Kansas on March 3, 1966. (R. 1).* The two plaintiffs, alleging diversity of citizenship, contended that they and the remaining members of a purported class consisting of eight sisters had been defrauded out of their interest in a tract of real property located in Rooks County, Kansas. Plaintiffs claimed that a judgment rendered in a 1944 quiet title action cutting off any right, title, or interest they had in the land had been procured by fraud and that the judgment was void on its face for failure to join indispensable parties.

*References to the certiorari Record are abbreviated herein as "R." and references to the "Petition" as "P."

These respondents (who are the oil and gas lessee of the tract in question and its grantees), together with the owners of most of the mineral and surface interests in the property were joined as defendants. Plaintiffs sought to recover possession of the property, an accounting for and a recovery of profits realized from the land, and damages.

Defendants moved to dismiss the purported class action because the eight-member "class" was impermissably small and was really a device to circumvent the diversity requirements for federal court actions. Three of the other members of the class were Kansas residents as were most of the defendants.

On October 21, 1966, the Honorable George Templar entered his "Ruling on Special Issue of Class Action." (R. 6). Judge Templar agreed with the defendants that the action was not a proper class action, but granted the individual plaintiffs ten days to file an amended complaint in their own behalf.

One week later, on October 28, 1966, defendants D. A. Hindman and Charley A. Lynd commenced a quiet title action in the District Court of Rooks County, Kansas and joined as defendants all the present claimants to the property. These respondents, whose interests do not conflict with those of Hindman and Lynd, are not parties to that action. This second lawsuit will be referred to herein as the "state court action" as distinguished from the instant "federal court" litigation.

Thereafter, on November 1, 1966, an amended complaint was filed in the United States District Court for the District of Kansas by Mary Catherine Shepard, mother of petitioner herein, and by Margaret Christensen. Mary Catherine Shepard subsequently died and petitioner was substituted in this action as plaintiff succeeding to a por-

tion of her alleged interest. (R. 11, 12). Petitioner thereafter had the other claimants to the property joined as "involuntary plaintiffs" notwithstanding their lack of diversity of citizenship from that of defendants.

Plaintiffs in the federal court action were unsuccessful in having the state court action stayed (R. 8) and filed counter-claims in the state court action raising all of the issues presented in the federal court case. The state court action was then tried to the court sitting without a jury, and on September 3, 1968, the Honorable C. E. Birney entered judgment against petitioner and the other defendant-claimants and quieted title (except for an undisputed 3/8 mineral interest) in favor of Hindman and Lynd against the claims of defendants Morse and the other claimants. (R. 29, 30). A motion for a new trial was overruled on October 13, 1968, and petitioner filed a notice of appeal to the Supreme Court of the State of Kansas as had the other defendants. The appeal to the Supreme Court of the State of Kansas is set for oral argument in that court on March 6, 1970.

After obtaining a favorable judgment in the state court action, defendants Hindman and Lynd filed a motion in the federal court action to stay all further proceedings therein pending the state court judgment becoming final. (R. 28). These respondents joined in that motion which was granted by Judge Templar on October 11, 1968. (Page 3 of Appendix to the Petition; R. 32). Petitioner was the only defendant to file a notice of appeal from the stay order and from several other prior orders. (R. 33). This purported notice of appeal was filed October 25, 1968.

Thereafter, on November 12, 1968, the United States Court of Appeals for the Tenth Circuit refused an original application of petitioner for a writ of prohibition or an injunction staying the proceedings in the Kansas courts.

On January 31, 1969, respondents filed a motion to dismiss petitioner's purported appeal to the Court of Appeals for the Tenth Circuit. (R. 46).

On February 10, 1969, and on February 24, 1969 petitioner filed two petitions for a writ of certiorari in this Court (No. 1031 and No. 1081). These petitions were both denied on April 1, 1969, and leave to file petitions for rehearing was also denied by this Court on May 17, 1969.

On September 17, 1969, the motion to dismiss was granted by the Court of Appeals for the Tenth Circuit. (R. 49, 50; Page 8 of the Appendix to the Petition).

On December 17, 1969, petitioner sent a telegram to this Court moving for an extension of time to file a petition for a writ of certiorari. This motion was granted by Mr. Justice White on December 17, 1969, without prejudice to the Court's consideration of whether the motion was filed in time.

In summary, there are two pending cases involving substantially the same issues concerning title to real property in Kansas. The case pending in the Kansas state court has been tried and is set for oral argument before the Supreme Court of Kansas on March 6, 1970. The federal court case has been stayed by order of the district judge, and the Court of Appeals for the Tenth Circuit has dismissed the appeal from the stay order.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals for the Tenth Circuit is manifestly correct and completely accords with the well developed body of law on the appealability of stay orders and timeliness of notices of appeals.

2. This action is absolutely unique on its facts, involves no conflict among the various Circuit Courts of Appeals and presents no question of public importance.

3. Petitioner is not entitled to any relief on the merits.

4. The pending appeal in the Supreme Court of the State of Kansas may well finally dispose of petitioner's claims on the merits.

ARGUMENT

I.

The Decision of the Court of Appeals Is Manifestly Correct and Completely Accords with the Well Established Body of Law on Appealability of Stay Orders and Timeliness of Notices of Appeal.

Petitioner is completely in error when he asserts that the action of the Court of Appeals conflicts with decisions of this Court. Indeed, the action of the Court of Appeals directly follows *City of Morgantown, West Virginia* v. *Royal Insurance Co.*, 337 U.S. 254, 69 S.Ct. 1067, 93 L.Ed. 1347 (1949) and *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955). In those two cases, this Court firmly established the principle that the only appealable stay orders are those orders entered staying common law actions pending the outcome of actions of an equitable nature. Among the cases in the various Courts of Appeals following this principle are *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40 (10th Cir. 1967), *cert. denied*, 389 U.S. 829, 88 S.Ct. 92, 19 L.Ed.2d 87 (1967); *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955), *cert. denied*, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955); and *International Nickel Co.* v. *Barry*, 204 F.2d 583 (4th Cir. 1953). Other cases are collected in the recent annotation at 18 A.L.R.3rd 400 (1968).

The rule enunciated by this Court was summarized by Judge Medina in his concurring opinion in *Lyons* v. *West-*

inghouse Electric Corporation, supra, in which the court held that a stay order pending the outcome of a state court appeal was not an appealable order:

> "Thus, we are constrained to conclude from the foregoing that appealability exists in these cases only when there has been 'a stay through equitable principles of a common law action.'" (222 F.2d at 192.)

In the case at bar, it is obvious—petitioner's bald statements to the contrary notwithstanding—that the instant action is primarily equitable in nature so that a "common law action" has not been stayed. Petitioner is seeking in this action to set aside a judgment against his mother because it was allegedly procured by fraud, and he is asking for an accounting of the proceeds from oil and gas operations, for the imposition of a constructive trust on profits derived from the property, for a declaration that the plaintiffs are the owners of the property, and for damages. Obviously, as the Court of Appeals held, petitioner's action is equitable in nature. He does not now have legal title to the property, as any legal title his mother ever had to the property was cut off by the 1944 quiet title action. He can only recover herein if he can establish a right to equitable relief. Petitioner's action is not, as he now claims, an assertion of legal title, his action is an assertion of an equitable right to relief.

The Supreme Court of Kansas, in fact, has held that in an ejectment action wherein the plaintiff based his right to possession on fraud, the action was equitable in nature. *New* v. *Smith,* 86 Kan. 1, 119 Pac. 380 (1911). Accordingly, petitioner is completely wrong in his assertion that the stay order entered in the district court was appealable, and the Court of Appeals was completely correct in granting respondents' motions to dismiss his attempted appeal.

As for the other matters petitioner attempted to include in his appeal, it is abundantly clear that petitioner was simply too late in filing his notice of appeal. The first motion filed in the federal case for an injunction against the state court proceedings was filed by plaintiff Margaret Christensen on April 27, 1967, and this motion was overruled on July 31, 1967. Petitioner then filed substantially the same motion which was overruled on March 8, 1968. (R. 18). Petitioner made no attempt to take an interlocutory appeal from this order.

Instead, petitioner waited nearly six months until September 3, 1968, when he moved the Court to vacate the March 8 order denying the injunction. (R. 27). On September 9, 1968, Judge Templar overruled this second motion by petitioner, and again petitioner made no attempt to take an interlocutory appeal pursuant to 28 U.S.C. §1292. Petitioner waited until October 25, 1968, to appeal from the orders regarding his requested injunction and included these orders in his notice of appeal concerning the stay order.

Petitioner waited too long. Under Rule 58 of the Federal Rules of Civil Procedure, the entry of a judgment or an order on the clerk's docket determines the date when the time for filing a notice of appeal starts to run. As stated by Professor Moore:

> "The term 'judgment', as pointed out, means an adjudicative order that is appealable and hence includes, in addition to a final order, any interlocutory order from which an appeal lies.
>
> "The notation of a judgment by the clerk in the civil docket which he is required by Rule 79(a) to keep constitutes the entry of the judgment. This makes it possible to enter the judgment almost instantly, once the entry is proper. * * *"
>
> (6A *Moore's Federal Practice*, Sec. 58.03 [1], pp. 3506-7.)

Professor Moore goes on to say:

> ". . . (B)oth the time for a direct appeal from the district court to the Supreme Court and time for the more common appeal from the district court to the court of appeals are geared to and begin to run from the entry of judgment. 'Entry of judgment' presupposes, of course, the rendition of a judgment, which is a judicial act, followed by the proper notation of the judgment in the civil docket, which is a ministerial act of the clerk."
>
> (6A *Moore's Federal Practice,* Sec. 58.05 [2], p. 3530.)

Petitioner's notice of appeal not having been filed within thirty days from September 9, 1968, it was clearly out of time.

Even if the date of entry of the order on the clerk's docket did not start the appeal time running, petitioner was still out of time in filing his notice of appeal because the September, 1968, order (or orders as the case may be) overruled his motion to vacate the March 8, 1968 order, and such motions to "vacate," "reconsider," "reargue," and the like cannot extend the time for filing a notice of appeal unless such motion is itself filed within ten days from the date the original order is entered. Both abrogated Rule 73 of the Federal Rules of Civil Procedure and current Rule 4 of the Federal Rules of Appellate Procedure (which went into effect on July 1, 1968—between the dates of the two orders in question) provide that the thirty day period for filing a notice of appeal is only tolled by the *timely* filing of certain enumerated motions, of which the only relevant motion is a motion under Rule 59.

As stated by Professor Moore:

> "The time for appeal is terminated only by a timely motion for judgment n.o.v. under Rule 50(b),

> or to amend or make additional findings under Rule 52 (b), or for a new trial under Rule 59(b), or to alter or amend the judgment under Rule 59(e). A motion which seeks reconsideration, *vacation*, or setting aside of a judgment entered without trial is functionally a motion under Rule 59(e). If it is timely made, i.e., made not later than ten days after entry of judgment, it terminates the running of the time for appeal; *otherwise it has no effect upon the running of the time for appeal.* The precise label attached to a motion is not of critical importance in this context. A motion to 'vacate' or to 'reargue' is effective as a motion under Rule 59(e) *so long as it is timely made.*"
>
> (9 *Moore's Federal Practice*, Sec. 73.09 [4], pp. 3183-3185. Emphasis added.)

Continuing on a few pages later, Professor Moore says:

> "By the express terms of Rule 73(a) only a timely motion under . . . Rule 59 has the effect of terminating the running of the time for appeal. To be timely a motion under one of these rules must be made not later than ten days after entry of judgment. * * * Thus, if no motion of a kind enumerated in Rule 73(a) has been made before the expiration of a period of ten days following entry of judgment, the time for appeal cannot be terminated by motions subsequently filed."
>
> (9 *Moore's Federal Practice*, Sec. 73.09 [4], pp. 3188-89.)

Among the decisions of Courts of Appeals which have followed the above statements are *Yates* v. *Behrend*, 280 F.2d 64 (D.C. Cir. 1960); *Dockery* v. *Travelers Company of Hartford, Connecticut*, 349 F.2d 1017 (5th Cir. 1965).

It should be noted that not only does the decision of the Court of Appeals for the Tenth Circuit thus square with the holdings of other Courts of Appeals and with a leading text writer's statements, petitioner has not cited to this Court any authority calling for any contrary holding

with respect to motions to reargue, vacate and the like. Nor has petitioner even made any argument as to why all of the above holdings and statements are incorrect and should be overruled. To the contrary, petitioner merely attempts to pick himself up by his broken shoelaces by incorrectly contending that his appeal from the stay order was proper so that everything that happened before the date of the stay order can be included in some sort of general interlocutory piecemeal review of the district court's actions. Petitioner completely overlooks both the fact that the stay order is itself unappealable, and that even if it were not unappealable, he would only have commenced an interlocutory appeal limited to the single issue of the propriety of the stay order.

Petitioner is also completely incorrect in his statement under heading 3 on page 11 of the Petition that the Court of Appeals held that the state courts can litigate title to real property over which federal courts are exercising prior jurisdiction. As the opinion of the Court of Appeals clearly shows, the appeal on the questions relative to the jurisdiction of the Kansas state courts was dismissed for the sole reason of not having been timely taken. Nothing in the opinion of the Court of Appeals touches on the question petitioner seeks to raise in this Court.

Indeed, petitioner has rather badly twisted the narrative of the entire course of the litigation in his third section commencing on page 11 of the Petition. He states that the federal district court had already assumed prior jurisdiction over the subject matter of the action when in fact the state court action was commenced prior to the original two plaintiffs filing an amended pleading so as to get back into federal court. Thus, the state court action became the prior action if priority is even involved. Indeed, it is questionable whether priority is involved be-

cause much of the relief sought herein is *in personam* relief, and "exclusive jurisdiction" over a *res* would not be a factor in this action until and unless petitioner succeeds in upsetting the 1944 judgment.

Petitioner has characterized his action as being (at least in part) an ejectment action (pp. 2, 8-9). Ejectment actions are considered to be *in personam* actions so that the rule that the court first acquiring jurisdiction of the *res* does not apply. *Lefkowitz* v. *McQuagge*, 296 F.2d 50 (5th Cir. 1961).

It is clear that *Kline* v. *Burke Construction Company*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922), cited by petitioner, is no authority for petitioner's position. Not only does *Kline* not contain any holding that a federal court *must* enjoin a state court that is interfering with the federal court's jurisdiction, it specifically holds that a federal court *cannot* enjoin a state court *in personam* action merely because the same issues are pending before the federal district court.

II.

The Case at Bar Involves a Unique Factual Situation of Concern Only to the Individual Litigants and Is of No Public Importance.

This lawsuit concerns only ownership of a parcel of Kansas real estate and the principal issues are whether a particular quiet title judgment rendered more than twenty-five years ago was fraudulently procured, whether indispensable parties were omitted from that lawsuit, and whether such omission invalidated the judgment. While these questions have economic importance to the litigants, there is nothing of nationwide public interest in any of such questions and the Court of Appeals did not deal with

any of these questions. Such questions are peculiarly "Kansas" in nature and can well be and shall be dealt with by the Kansas courts.

The only questions yet decided by the Court of Appeals concern well established principles of appellate practice. An opinion by this Court on such principles would only be repetitive. No new questions of public importance are presented in the Petition.

III.

Petitioner Is Not Entitled to Any Relief on the Merits.

Although we recognize that this is not the time for this Court to determine questions relative to the merits of the lawsuit, it is appropriate that we summarize briefly why the Rooks County District Court was correct in ruling against petitioner. Petitioner in the state court trial[3] had a full and fair trial, but he simply had no basis for his claims. Basically, his two claims for relief are (1) alleged fraud on the part of his grandmother in inducing his mother and her sisters not to defend the quiet title action and (2) voidness of the judgment because "indispensable parties" were not joined.

As for the claim of petitioner that petitioner's grandmother, Hattie Atherton, fraudulently tricked her children into not defending the 1944 quiet title action, the district judge of the Rooks County district court who heard the evidence on that point said:

> "The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Sheperd, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and pros-

ecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action."

"* * * There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children." (Our Appendix, pp. A7, A8).

The "indispensable parties" contention of petitioner is completely untenable as a matter of law. The three persons petitioner claims were indispensable parties to the action were James E. Atherton (the minor son of the life tenants, George and Hattie Atherton, who conveyed their entire interest in the property to respondents Hindman

and Lynd), Mary Dunlap and Mary Hillman Casey. James E. Atherton died a minor and without issue in 1934 or about ten years before the conveyance and quiet suit in question. Obviously, since his remainder interest, if any, had passed by intestacy to his parents ten years before the commencement of the quiet title suit, he was not an indispensable party.

Similarly, another of the alleged indispensable parties was Mary Dunlap who was the daughter of one of the defendants in the original quiet title action actually served with process. Mary Dunlap had no interest in the property at the time of that suit as her father was still alive and still vested of record with whatever interest might have descended to him, so there was no reason for her to be joined.

Almost exactly the same situation obtains for the third of the so-called indispensable parties, Mary Hillman who is also known as Mary Casey. She was the daughter of Barbara Hillman who was also a named defendant in the 1944 quiet title action. Since any remainder interest would have passed to Barbara Hillman and since there was no conveyance or other document of record transferring her interest to her daughter Mary, there was no reason to join Mary as a party. Clearly, these two daughters of living named defendants had no vested or contingent interest in the property and were not even proper parties to that 1944 action much less indispensable parties.

But even if those three persons were somehow indispensable, the failure to join them would not have made the judgment void as claimed by petitioner. A court that proceeds to try an action that has not had all indispensable parties joined is in error, but the failure to join indispensable parties does not deprive the court of the power to enter a binding judgment over the parties who are properly

joined. *E.g., Doerr* v. *Warner,* 76 N.W.2d 505 (Minn. 1956); *Dyer* v. *Stauffer,* 19 F.2d 922 (6th Cir. 1927), *cert. denied,* 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed. 421 (1927); *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936); *Shields* v. *Barrow,* 17 How. 130, 141, 15 L.Ed. 158 (1855); 2 Barron & Holtzoff, *Federal Practice and Procedure,* §516, p. 163; and 3A *Moore's Federal Practice,* Sec. 19.07-2 [0], p. 2258. Cf., *Bogart* v. *Southern Pac. Co.,* 228 U.S. 137, 146, 33 S.Ct. 497, 57 L.Ed. 768 (1913). Petitioner's mother, from whom petitioner acquired his claimed interest, was a defendant in that action and was properly served with process.

Moreover, purely legal and technical questions relating to the first quiet title action aside, as the learned Kansas district court judge correctly observed, the transaction in which George and Hattie Atherton saved their home from sale at tax foreclosure was entered into in good faith by all parties and with the full knowledge and approval of the eight daughters including petitioner's mother. There was nothing wrongful or fraudulent about any part of the transaction. Years later, after oil production was obtained on the property, the daughters and some of their children apparently have changed their minds and now wish they had found some other way for their parents to keep from losing the family farm for non-payment of taxes. It is too late for such second thoughts, however, and, under familiar legal doctrines of finality of judgments and under equitable doctrines of estoppel and laches, petitioner and his relatives have no basis for their present lawsuits.

IV.

The Supreme Court of Kansas Will Soon Rule on the Merits of Petitioner's Case.

Oral argument of the state court appeal is set for March 6, 1970. That court should therefore announce its decision in April of this year. If the decision of the trial court is affirmed, this litigation will at long last come to an end. If, on the other hand, this Court should grant the Petition and should thereafter command the Supreme Court of Kansas to stay its proceedings, the whole case will have to be tried over again, there will be still another series of appellate proceedings and more years will pass before this case is concluded.

It is most significant that petitioner has not ever mentioned in his Petition how having the case tried in the state court prejudiced him. Nor, for that matter, has petitioner shown this Court that any different result would obtain in a trial in the federal court than obtained in the state court. As we have indicated in the preceding section of this brief, petitioner really has no case on the merits and his alleged right to relief is—like his arguments before this Court—without basis.

CONCLUSION

We have demonstrated that not only is there no reason why this Court should issue the writ requested by petitioner, but that there is no merit to petitioner's basic lawsuit. Respondents therefore earnestly and respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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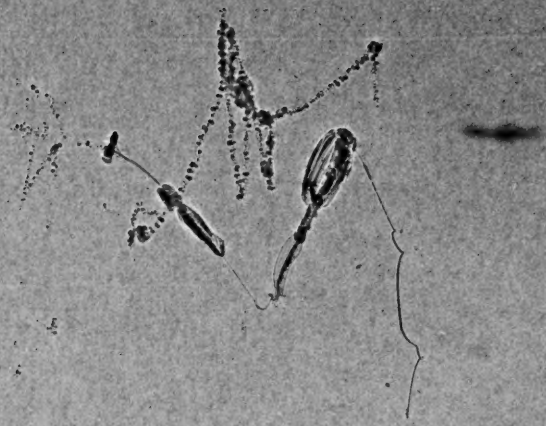

APPENDIX

IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,

Plaintiffs,

vs.

MARY CATHERINE SHEPARD, ET AL.,

Defendants.

No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs would make no further reply, so it is assumed this last brief of Marvin J. Morse will not be answered.

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8th interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8th interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925. The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case

No. 7783, styled *Board of County Comm.* v. *Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Athertons and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay

the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided

1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman*, in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet title suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1944, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is neces-

> sary later for them to sign the deed, they will do that. All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5.)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance that the Lynds would convey to the Athertons 3/8th interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transactions with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/8th of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8ths royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8th royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes) executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8th mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of

limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman, et al.*

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. G. Birney
District Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1007

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

This Petition for Writ of Certiorari seeks review of a decision by the United States Court of Appeals for the Tenth Circuit dismissing an appeal of the petitioner. Although the appeal was from all adverse rulings by the United States District Court of Kansas, the particular rulings which were the subject of the appeal were the denial of petitioner's Motion for Summary Judgment, the overruling of motions to stay a state court pro-

ceeding and the order by the District Court staying its own proceeding. The Stay Order was made after the state court proceeding had been tried and an appeal had been taken to the Kansas Supreme Court. The oral argument in the state court appeal has been set for March 6, 1970.

Petitioner's appeal was dismissed by the Court of Appeals for the reasons that the Notice of Appeal was out of time to all orders except the order staying the proceeding. The Stay Order, in the opinion of the court, was not an appealable order. (A 1)

ARGUMENT

Petitioner lists three reasons for granting Writ of Certiorari. The first is that the decision by the Court of Appeals that the Stay Order was not an appealable order is in conflict with decisions of this Court. The Court of Appeals' decision was based upon the well-established rule that a stay order is only appealable when a legal action is stayed to permit the prior determination of a related equitable matter. *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40 (10th Cir. 1967); *Jackson Brewing Co.* v. *Clarke*, 303 F.2d 844 (5th Cir. 1962). The Court of Appeals found that the first prerequisite did not exist because the proceeding that had been stayed was not legal but equitable in nature.

It is obvious from petitioner's argument that he is not attacking the criteria adopted by the Court of Appeals for determining whether a stay order is appealable. What the petitioner is contesting is the court's finding that the proceeding that was stayed was essentially equitable in nature. The sole attack made on this finding is petitioner's contention that it was a legal impossibility for the Court of Appeals to find that this proceeding included relief in the form of a quiet title judgment. The premise on which

petitioner bases this contention is that a quiet title action cannot be brought by a party not in possession. Petitioner cites only one case from Arkansas which is supposedly authority for this position. Assuming this case represents the law in Arkansas, the rule in Kansas, which is the applicable state law, permits quiet title actions by parties not in possession. *Westbrook* v. *Schmaus,* 51 Kan. 558 (1893); 60 K.S.A. 1002; *Walker* v. *Rooney,* 135 Kan. 158.

The Court of Appeals also found that the proceeding included relief in the form of an accounting and an imposition of a trust upon certain funds. These types of relief the court found were also equitable in nature. Petitioner makes no attempt to argue in opposition to this finding.

Not one single decision by this Court has been cited by the petitioner which supports his argument that the Court of Appeals' decision is in conflict with decisions of this Court. The decision by the Court of Appeals was based on its finding that the stayed proceeding was equitable in nature. The only authority mentioned that possibly could be construed to be in conflict with the decision is a case from Arkansas which is not even the applicable state law.

Petitioner's alleged second reason for granting certiorari is that the decision by the Court of Appeals that the Notice of Appeal was untimely to all orders except the Stay Order is in conflict with decisions of other Courts of Appeal. As mentioned before, the appeal was from all adverse orders and rulings by the District Court. The Court of Appeals held the appeal was untimely to all orders except the Stay Order. Petitioner's opposition to the decisions appears to be only on behalf of the order denying petitioner's Motion to Vacate an earlier order. No argu-

ment has been made with respect to other orders in which the Notice of Appeal was also held to be untimely.

The order denying petitioner's Motion to Vacate was made by the District Court on September 9, 1968. An entry was made in the docket sheet that same date reciting that the Motion had been denied. On September 25, 1968, a written order was filed and noted on the docket sheet. This order stated that the Motion to Vacate had been denied. The Notice of Appeal was filed October 25, 1968.

The Court of Appeals held that the time for filing an appeal with respect to the Motion to Vacate commenced on September 9, 1968, when the clerk first entered the order on the docket sheet. Petitioner contends that this holding conflicts with the decision by the Fifth Circuit Court of Appeals in *Pure Oil Company* v. *Boyne*, 370 F.2d 121 (1966). The position of petitioner is that the *Pure Oil* case holds that the time for appeal does not start until September 25, 1968. The brief of co-respondents to this petition contains an authoritative discussion of when the time for Notice of Appeal begins. Their brief concludes that the Tenth Circuit decision is correct and is not conflicting with any decision of other Circuit Courts. It would be of no benefit to repeat this argument here. However, it should be mentioned and made clear that the only order which is in question as to the time of the appeal was the denial of a Motion to Vacate. Even the petitioner acknowledges that this order was not an appealable order.

The third reason stated by petitioner for granting certiorari is that the decision by the Court of Appeals that the State Court of Kansas may litigate another case involving matters related to this case is in conflict with decisions of this Court and the Supreme Court of Kansas. The written opinion by the Court of Appeals which is

part of the appendix to the petition clearly does not contain any decision with respect to the jurisdiction of the state courts of Kansas. Obviously, since the Court of Appeals did not rule on this matter, it cannot constitute a reason for granting certiorari. Apparently, petitioner is attempting to obtain another review of issues he raised in two other petitions for writ of certiorari filed with this Court (October Term Nos. 1031 and 1081). These petitions were denied and also petitions for rehearing were denied.

CONCLUSION

The reasons petitioner advances for granting certiorari are entirely without merit. Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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